Supreme Court, U.S.
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No. 98-1981

In the Supreme Court of the United States

CONTECH DIVISION, SPX CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether the court of appeals erred in enforcing the National Labor Relations Board's order that rejected petitioner's challenge to the Board's earlier decision setting aside a representation election based on its finding that petitioner's statements and conduct during the election campaign contained the threat of reprisal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 164 F.3d 297. The decision and order of the National Labor Relations Board finding that petitioner had engaged in unfair labor practices following a second representation election (App., *infra*, 1a-7a) is unreported, but the decision is noted at 322 N.L.R.B. No. 111. The Board's decision and certification of representative (Pet. App. 40a-42a), and the reports of the regional director and the hearing officer (Pet. App. 60a-67a, 70a-107a), are unreported. The Board's earlier decision in the underlying representation proceeding (Pet. App. 22a-39a), wherein it set aside the initial election and directed that the second election be held, is reported at 320 N.L.R.B. 219.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1998. A petition for rehearing was denied on March 11, 1999 (Pet. App. 68a-69a). The petition for a writ of certiorari was filed on June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(c) of the National Labor Relations Act (Act), 29 U.S.C. 158(c), provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.

Under Section 8(c), an employer may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The employer "may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Ibid.* "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction

based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *Ibid.*

2. a. Petitioner produces automotive parts for the Ford Motor Company, TRW, and other automotive suppliers. Pet. App. 3a. On November 14, 1994, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Union) filed a representation petition with the National Labor Relations Board (Board) seeking an election among the production and maintenance employees at petitioner's two plants in Dowagiac, Michigan, on whether to certify the Union as the employees' representative. *Ibid.*

Pursuant to a stipulated election agreement, a representation election was conducted on January 12, 1995. Pet. App. 7a. The Union lost by a vote of 196 to 154. *Ibid.* The Union filed with the Board objections to the election alleging, *inter alia*, that, prior to the election, petitioner had "conducted a campaign of fear and intimidation through predictions of violence, strikes, loss of customers and economic detriment which [petitioner] insinuated would inevitably result from a union victory," and had threatened to "go out of business, close the plant or that customers would remove work if [the Union] won the election." *Ibid.*

b. On December 19, 1995, the Board sustained the Union's objection, set aside the results of the election, and directed that a second election be conducted. Pet. App. 22a-39a. Applying the principles set forth in *Gissel Packing*, *supra*, the Board concluded that "parts of [petitioner's] speeches, statements, and other communications had a reasonable tendency to create and reinforce an atmosphere of fear among the employees

that a union victory could result in loss of work, jobs, and customers, and in-plant closure." Pet. App. 30a.

Specifically, the Board agreed with findings by the hearing officer that petitioner's failure to explain to the Union the reason for the loss of some of their Ford company production work, combined with petitioner's distribution of an article to employees about loss of Ford production work by another company that had been unionized and struck, tended to suggest to the Union that its loss of the Ford work "may have been related to the presence of the Union." Pet. App. 30a. The Board also found that petitioner's managers told employees that the Union and the election were to blame for postponement of contract renewal negotiations with TRW. The Board further found that, together with comments by another manager that TRW was trying out alternative suppliers, such comments by company officials "in the context of [petitioner's] campaign against the Union, would reasonably lead the employees to conclude that TRW's relationship with [petitioner] was in jeopardy because of the Union, and that the outcome of the election could determine whether the TRW contract was renewed." *Id.* at 31a.[1]

Because these statements "gave the employees reason to believe that TRW and Ford were already retreating from their relationship with [petitioner] because of the Union," a speech by a company manager two days before the election emphasizing the shut down of unionized plants owned by petitioner's parent company "had a reasonable tendency to make the em-

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[1] Moreover, petitioner did not explain to the employees that product quality and delivery issues were contributing factors in TRW's hesitancy to enter into a new production agreement with petitioner. Pet. App. 5a, 26a.

ployees fear that a union victory could result in a loss of work for [petitioner]." Pet. App. 28a-29a; *id.* at 31. The Board found that the impression conveyed to employees by those manager comments "was further amplified" by the highly visible inspection tour of petitioner's facilities by a TRW official, just a few days before the election "accompanied by an entourage of [petitioner's] managers and supervisors." *Id.* at 32a, see also *id.* at 29a. The Board found that those events also "gave added weight" to a letter to the employees by petitioner's president, three days before the election, expressing concern that petitioner's customers "would become nervous about the Union's presence." *Id.* at 32a; see also *id.* at 28a. The Board found that those events also "provided additional context" for a statement by another of petitioner's managers that the outcome of the election could affect petitioner's relationship with TRW. *Id.* at 32a.

The Board concluded that petitioner thereby created an atmosphere in which the statements "would reasonably have been understood by [employees] as an implicit prediction that work and jobs would be lost if the Union won the election." Pet. App. 32a. The Board found that the record did not establish that the prediction was based on objective facts beyond petitioner's control. Thus, the prediction constituted "an objectionable threat of lost customers, warranting the setting aside of the election." *Ibid.*; see also *id.* at 33a. Accordingly, the Board directed that a second election be conducted among the appropriate unit of petitioner's employees. *Id.* at 38a-39a.

3. a. Pursuant to the Board directive, a second representation election was held on March 13, 1996. Pet. App. 40a. The Union won by a vote of 184 to 150. *Ibid.* Petitioner filed with the Board objections to conduct

that allegedly affected the results of the second election alleging, *inter alia*, that the Union, through various campaign documents, had misrepresented why the second election was being held, had falsely stated that petitioner had made misrepresentations to the employees, and had implied that customers would be lost if the Union were not selected as the bargaining representative. *Id.* at 62a-63a.

The Board adopted findings and recommendations of the regional director (Pet. App. 60a-67a), rejected petitioner's objections, and certified the Union as the employees' bargaining representative. *Id.* at 40a-42a.

b. Despite the Board's certification, petitioner refused to bargain with the Union. Pet. App. 3a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner's refusal constituted a violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Pet. App. 3a, 14a. On summary judgment, the Board concluded that petitioner had violated the Act as alleged, and ordered it to bargain with the Union. App., *infra*, 5a. The Board rejected petitioner's attack on the validity of the certification, which was based on petitioner's objection to the holding of the second election. *Id.* at 2a. The Board found that all representation issues raised by petitioner "were or could have been litigated in the prior representation proceeding," and that petitioner had not raised any representation issue "that is properly litigable in this unfair labor practice proceeding." *Ibid.*

c. The court of appeals enforced the Board's order. Pet. App. 1a-21a. The court concluded that substantial evidence supports "each of the Board's decisions in question." *Id.* at 3a.

The court rejected petitioner's argument, based primarily on *NLRB* v. *Pentre Electric, Inc.*, 998 F.2d 363 (6th Cir. 1993), that the Board "improperly set aside the results of the first election because the statements of [petitioner's] representatives were truthful and entitled to protection under Section 8(c) of the Act, 29 U.S.C. 158(c)." Pet. App. 17a. The court emphasized that, "[u]nlike *Pentre*, which involved an alleged unfair labor practice arising from an employer's pre-election conduct, the present matter involves the Board's broader discretion to set aside the results of an election," and that the Board may set aside an election "even though an employer's conduct does not rise to the level of an unfair labor practice." *Id.* at 18a (citation omitted). The court further explained that "even if we were to apply Section 8(c)'s language to the election context, * * * the employer's expression of its views is protected only 'if such expression contains no threat of reprisal.'" *Ibid.* The court explained that petitioner

> crossed the line in the present case * * * in the linking of such literature [about job losses elsewhere] to its own intimidating conduct in transferring production of the Ford part to another * * * plant without explanation, in its timing of the quality-inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials.

Id. at 18a-19a. The court noted that the Board "in effect concluded that [petitioner's] overall conduct contained the threat of reprisal," and that the court could not say that there was an absence of substantial evidence to support the Board's findings. *Id.* at 19a.

The court of appeals also concluded that "substantial evidence supports the Board's determination that the circumstances surrounding the second election allowed the employees to exercise a free and fair choice in deciding to be represented by the [Union]." Pet. App. 19a. Accordingly, the court upheld the Board's decision to certify the result of the second election. *Id.* at 19a-21a.

ARGUMENT

Petitioner does not challenge the court of appeals' decision insofar as it upheld the Board's certification of the Union as the employees' bargaining representative based on the result of the second election held on March 13, 1996. Petitioner challenges the court's decision only insofar as it affirmed the Board's action in setting aside the first election held on January 12, 1995.

1. Petitioner contends (Pet. 7-9) that review by this Court is warranted because the court of appeals erroneously failed to apply Section 8(c) of the Act in determining whether petitioner's anti-union campaign warranted setting aside the result of the first election. Petitioner disregards, however, the fact that, although the court suggested that Section 8(c) is applicable only to unfair labor charges and not to decisions setting aside elections,[2] the court nonetheless proceeded to

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[2] In so noting, the court was merely referring to the settled principle that the Board has authority under Section 9 of the Act, 29 U.S.C. 159, to set aside an election for conduct by a party to the election that impairs employee free choice, even though such conduct does not amount to an unfair labor practice under Section 8 of the Act, 29 U.S.C. 158. See Pet. App. 18a (citing *NLRB* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 181 (6th Cir.), cert. denied, 389 U.S. 958 (1967)). The question whether the Board could properly set aside an election based on speech, standing alone, that does not contain a "threat of reprisal or force or promise of benefit," 29

review the Board's setting aside of the first election under the standards of Section 8(c).

The court explained that, under the language of Section 8(c), an "employer's expression of its views is protected only 'if such expression contains no threat of reprisal.'" Pet. App. 18a. The court concluded that, "where [petitioner] crossed the line" demarcated by Section 8(c), and therefore fell outside the protective ambit of that provision, was in linking its literature about job losses elsewhere that resulted from unionization "to its own intimidating conduct in transferring production of the Ford part to another * * * plant without explanation, in its timing of the quality-inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials." *Id.* at 18a-19a. The court found that, therefore, there was substantial evidence to support the Board's conclusion, in effect, that petitioner's "overall conduct contained the threat of reprisal, thus denying the employees a free and fair election choice." *Id.* at 19a. See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (to fall within protection of Section 8(c), expression of views must not contain any "threat of reprisal or force").

Accordingly, there is no merit to petitioner's claim (Pet. 8-9) that review by this Court is warranted to address a ruling by the court of appeals that the Board may overturn an election based upon "employer state-

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U.S.C. 158(c), is not presented here because, as discussed above, the court specifically found, as did the Board, that petitioner engaged in speech and conduct that conveyed to the employees a threat of reprisal, including plant closure, in the event that the Union won the first election.

ments that do not violate Section 8(c) and are protected by the first amendment." Pet. 8. The court of appeals made clear that the employer statements and conduct at issue do violate Section 8(c) because they "crossed the line" and contained the threat of reprisal. Pet. App. 18a-19a. Indeed, petitioner acknowledges elsewhere (see Pet. 11) that the court of appeals analyzed the circumstances surrounding the first election campaign under the Section 8(c) standard and stated that its conclusion would stand if Section 8(c) were applied.

Petitioner's related suggestion (Pet. 12-18) that there was no record evidence to support the conclusion that petitioner's statements and conduct contained the threat of reprisal, in violation of Section 8(c), raises no issue warranting further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Contrary to petitioner's claim (Pet. 9), the decision below does not conflict with *US Airways, Inc.* v. *National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999). In *US Airways*, the court concluded that the principles of *Gissel Packing*, *supra*, apply to employer campaign speech in elections conducted under the Railway Labor Act, 45 U.S.C. 151 *et seq.* 177 F.3d at 991. Applying *Gissel Packing*, the court concluded that the National Mediation Board (NMB) had issued an order that included two provisions that prospectively restrained US Airways from making, during a rerun election campaign, statements that would be protected under *Gissel Packing*. *Id.* at 992-994. The court emphasized that one provision applied to statements merely of the employer's views about unionism or a particular union that did not contain the threat of reprisal (*id.* at 993), and the other provision applied to statements that included objective predictions, not

"subjective predictions * * * such as a bare assertion that temporary layoffs could occur if the union is elected" (*ibid.*).[3]

Thus, unlike the instant case which involved speech combined with conduct to create circumstances that contained the threat of reprisal to employees, *US Airways* involved only discrete types of pure speech that the court found unobjectionable under *Gissel Packing*. 177 F.3d at 992-994; see also *id.* at 992 (distinguishing, and not addressing propriety of, employer's campaign prior to first election, which was "a potpourri of speech and conduct"). The *US Airways* court emphasized that, because the two provisions of the NMB's order at issue there regulated pure speech, its analysis was simplified because there was no need "to confront the situation where an employer's otherwise protected speech becomes unprotected because the employer also engages in conduct tending to coerce." *Id.* at 992. As the *US Airways* court fully recognized, where, as here, the employer's "overall conduct contained the threat of reprisal," the employer's campaign is not protected by Section 8(c) of the Act. See *id.* at 993.

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[3] The NMB's order precluded the employer from conducting a campaign "which indicate[s] a pre-existing committee is, or should be, a substitute for the collective bargaining representative," or "indicate[s] that the certification of a labor organization as the representative of the employees will lead to the termination of a pre-existing committee." 177 F.3d at 992. The court found that the former kind of campaign statement contains no threat of reprisal, and that the latter kind of statement would be based on "[an] objective circumstance stem[ming] from law," namely, that "[w]here the NMB has certified a representative for a carrier's employees, the [Railway Labor Act] imposes on the carrier the duty to 'treat with' that certified representative and none other in negotiating working conditions." *Id.* at 993. No such employer statements are involved in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999

APPENDIX

Case 7-CA-39061

CONTECH DIVISION, SPX CORPORATION *AND* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO.

[December 9, 1996]

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to a charge filed on October 4, 1996, the General Counsel of the National Labor Relations Board issued a complaint on October 8, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-20485. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 4, 1996, the General Counsel filed a Motion for Summary Judgment. On November 5, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits its refusal to bargain, but denies that the Union is the exclusive bargaining representative of the unit employees and attacks the validity of the certification on the basis of its objection to the holding of a second election in the representation proceeding. The Respondent contends that the second election was improperly and wrongfully ordered and is thus invalid.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

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[1] 320 NLRB No. 52 (1995).

[2] Member Fox did not participate in the underlying representation proceeding. However, she agrees with her colleagues that the Respondent has raised no new issues in this "technical" 8(a)(5) proceeding warranting a hearing.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and places of business in Dowagiac, Michigan, has been engaged in the manufacture and nonretail sales of automotive parts. During the 12-month period ending December 31, 1995, the Respondent, in conducting its business operations described above, sold and shipped from its Dowagiac, Michigan facilities goods valued in excess of $50,000 directly to points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the second election held on March 13, 1996, the Union was certified on August 5, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since August 20, 1996, and September 24, 1996, the Union has requested the Respondent to bargain and, since September 30, 1996, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 30, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Con-*

struction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Contech Division, SPX Corporation, Dowagiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Respondent at its facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Dowagiac, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and maintenance employees employed by us at our facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

CONTECH DIVISION, SPX CORPORATION